Elitprop Sdn Bhd v Yeo Ping Tieng & Ors and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(W)-1230–08 OF 2015 AND W-02(W)-1231–08 OF 2015
HAMID SULTAN, ABDUL RAHMAN SEBLI AND ASMABI MOHAMAD JJCA
14 FEBRUARY 2017

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Land Law — Indefeasibility of title and interests — Registration — Housing developer sold alleged beneficial interest in property to plaintiff without knowledge of property's registered owner — Plaintiff could not show nature of beneficial interest housing developer had acquired in subject property — Registered owner subsequently transferred property to defendant — Whether upon registration as proprietor of subject property defendant acquired indefeasible title under s 340 of the National Land Code ('the NLC') — Whether plaintiff had no right in rem to challenge defendant's title under s 340 of the NLC

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PKNS owned a piece of land ('the land') which was given to a housing developer, Janavista Sdn Bhd ('Janavista') to develop. Janavista owed monies to its contractor, Design Selection Sdn Bhd ('Design Selection') which, in turn, owed monies to its subcontractor, Biaxis Sdn Bhd ('Biaxis'). To settle the debts between themselves, Janavista agreed to sell a plot ('the lot') in the land to Biaxis or its nominee. Biaxis nominated its director, Yeo Ping Tieng ('Yeo') to receive the lot on which Janavista and Design Selection agreed to build a bungalow. Yeo charged the lot to Public Bank Bhd ('Public Bank'). The charge was secured by a facilities agreement, a deed of assignment and a power of attorney. Yeo later discovered that Janavista had sold the lot to Elitprop Sdn Bhd ('Elitprop') which had become the registered owner thereof. Yeo lodged a private caveat on the property. Alleging that they were victims of a conspiracy to defraud, Yeo, Biaxis and Public Bank ('the plaintiffs') sued Janavista, Design Selection and Elitprop ('the defendants') in the High Court seeking, inter alia, a declaration that Yeo was the true owner of the lot subject to Public Bank's charge thereon and that any sale and purchase agreement purporting to sell the lot to Elitprop was invalid. The plaintiffs sought an order that the land register be rectified to record Yeo as the owner of the lot and Public Bank as the chargee. Elitprop counterclaimed for damages against Yeo for wrongful entry of his private caveat. The High Court dismissed the counter claim and allowed the plaintiffs' claim but ordered them to pay Elitprop RM314,844 which was the price it supposedly paid for the property. The instant appeals by Elitprop and the plaintiffs were against the High Court's decision. At the hearing of the appeals, Elitprop argued that the plaintiffs failed to show the nature of the beneficial interest in the lot that Janavista had sold to Yeo when it was not even the registered owner of the property in the first place; that there was also no

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A evidence of any fraud Elitprop had been party to. Elitprop argued that in contrast to the plaintiffs' weak case, it became the registered owner of the lot by way of a memorandum of transfer executed by the previous owner, PKNS, and as such, had acquired an indefeasible title to the property under s 340 of the National Land Code ('the NLC') which could not be defeated.

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Held, allowing Elitprop's appeal, dismissing the plaintiffs' appeal and setting aside the orders of the High Court:

(1) The title to the lot had been issued in PKNS' name in 2005 itself. The C agreements which were entered into by the plaintiffs and the first and second defendants were in 2006 when the individual title to the lot had been issued. PKNS, which had the title to the property in its name, was not a party to the sale and purchase agreement related to the plaintiffs. Consequently, s 340 of the NLC was of no assistance to the plaintiffs. D Elitprop became the registered proprietor of the land, having obtained good title from PKNS, which was indefeasible under s 340 of the NLC rendering the plaintiffs' claim unsustainable as per their pleaded case (see para 17).

E (2) Whatever rights the plaintiffs had secured through the first defendant was only a right *in personam* and not a right *in rem* on the title for s 340 of the NLC to apply (see para 11).

(3) The first plaintiff had charged the property to Public Bank based on facilities agreement, deed of assignment and power of attorney, a F transaction which would only be relevant if there was no title issued to the property. The High Court judge's failure to deal with the title issue and the related sale and purchase agreement and assignment, etc was an omission which compromised the decision-making process. This issue, which went to the heart of the plaintiffs' locus standi, was a jurisdictional G issue related to s 340 of the NLC which ought to have been considered whether or not it was the pleaded case of the parties (see para 8).

[Bahasa Malaysia summary

PKNS memiliki sebidang tanah ('tanah tersebut') yang diberi kepada pemaju H perumahan, Janavista Sdn Bhd ('Janavista') untuk dimajukan. Janavista berhutang wang dengan kontraktornya, Design Selection Sdn Bhd ('Design Delection') yang berhutang pula dengan subkontraktornya, Biaxis Sdn Bhd ('Biaxis'). Untuk menyelesaikan hutang-hutang sesama mereka, Janavista bersetuju menjual satu lot tanah kepada Biaxis atau penamanya. Biaxis I menamakan pengarahnya, Yeo Ping Tieng ('Yeo') untuk menerima lot yang mana Janavista dan Design Selection setujui untuk membina banglo. Yeo memajakkan lot tersebut kepada Public Bank Bhd ('Public Bank'). Pajakan dicagar oleh perjanjian kemudahan, surat ikatan penyerahakkan dan surat kuasa wakil. Yeo mendapat tahu Janavista telah menjual lot tersebut kepada

Elitprop Sdn Bhd ('Elitprop') yang seterusnya menjadi pemilik berdaftar. Yeo memasukkan kaveat persendirian atas hartanah tersebut. Mendakwa bahawa mereka mangsa-mangsa konspirasi untuk menipu, Yeo, Biaxis dan Public Bank ('plaintif-plaintif') menyaman Janavista, Design Selection dan Elitprop ('defendan-defendan') di Mahkamah Tinggi memohon, antara lain, satu pengisytiharan bahawa Yeo adalah pemilik sebenar lot yang dipajak pada Public Bank dan apa-apa perjanjian jual beli bagi tujuan jualan lot kepada Elitprop tidak sah. Plaintif-plaintif memohon satu perintah agar daftar tanah dibetulkan untuk merekodkan Yeo sebagai pemilik lot dan Public Bank sebagai pemajak. Elitprop menuntut balas bagi ganti rugi terhadap Yeo bagi kemasukan salah kaveat persendiriannya. Mahkamah Tinggi menolak tuntutan balas dan membenarkan tuntutan plaintif tetapi mengarahkan mereka membayar RM314,844 kepada Elitprop iaitu harga yang sepatutnya dibayar bagi hartanah tersebut. Rayuan-rayuan oleh Elitprop dan plaintif-plaintif adalah terhadap keputusan Mahkamah Tinggi. Semasa perbicaraan rayuan-rayuan, Elitprop menghujahkan bahawa plaintif-plaintif gagal menunjukkan sifat kepentingan benefisiari dalam lot yang Janavista jual kepada Yeo sedangkan Janavista bukan pemilik berdaftar hartanah; tiada keterangan yang menunjukkan penipuan oleh Elitprop. Elitprop menghujahkan bahawa bertentangan dengan kes plaintif-plaintif yang lemah, ia menjadi pemilik berdaftar lot melalui memorandum pindah milik yang dilaksanakan oleh pemilik asal, PKNS dan dengan demikian, memperoleh hakmilik tak boleh sangkal hartanah bawah s 340 Kanun Tanah Negara ('KTN') yang tidak boleh dilupuskan.

Diputuskan, membenarkan rayuan Elitprop, menolak rayuan plaintif-plaintif dan mengetepikan perintah-perintah Mahkamah Tinggi:

(1) Hakmilik lot telah dikeluarkan bawah nama PKNS pada 2005 sendiri. Perjanjian-perjanjian yang dimasuki oleh plaintif-plaintif dengan defendan pertama dan kedua juga dalam 2006 apabila hakmilik persendirian lot dikeluarkan. PKNS, yang mempunyai hakmilik hartanah pada namanya, juga bukan pihak dalam perjanjian jual beli berkaitan plaintif-plaintif. Oeh itu, s 340 KTN tidak membantu plaintif-plaintif. Elitprop menjadi pemilik berdaftar tanah setelah memperoleh hakmilik sah yang tidak boleh disangkal bawah s 340 KTN daripada PKNS, menjadikan tuntutan plaintif tidak boleh dikekalkan seperti kes yang mereka plidkan (lihat perenggan 17).

(2) Apa-apa hak yang plaintif-plaintif peroleh daripada defendan pertama cuma hak *in personam* dan bukan hak *in rem* untuk hakmilik s 340 KTN terpakai (lihat perenggan 11).

(3) Plaintif pertama telah memajak hartanah tersebut pada Public Bank berdasarkan perjanjian kemudahan, surat ikatan penyerahakkan dan surat kuasa wakil, satu transaksi yang hanya menjadi relevan jika

A hakmilik tidak dikeluarkan bagi hartanah. Kegagalan Hakim Mahkamah Tinggi menangani isu hakmilik dan perjanjian jual beli dan penyerahakkan dan sebagainya adalah ketinggalan yang menjejaskan proses membuat keputusan. Isu ini, yang menjejasan akar umbi locus standi plaintif-plaintif, adalah isu bidang kuasa berkaitan s 340 KTN.
B Yang sepatutnya dipertimbangkan adalah sama ada kes ini diplidkan oleh pihak-pihak (lihat perenggan 8).]

Notes

For cases on indefeasibility of title in general, see 8(2) *Mallal's Digest* (5th Ed,
C 2017 Reissue) paras 3718–3724.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)
D *Eagil Trust Co Ltd v Pigott-Brown and another* [1985] 3 All ER 119, CA (refd)
Kamdar Sdn Bhd v Bipinchandraa a/l Balvantrai & Ors [2016] MLJU 974, CA (refd)
R v Harrow Crown Court, ex parte Lingard [1998] Lexis Citation 2547, QBD (refd)
E *Yeo Ping Ting lwn Janavista Sdn Bhd* [2015] MLJU 799, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69
National Land Code s 340 340(1), (2), (3)
F Rules of Court 2012 O 34

Appeal from: Civil Trial No S-22–812 of 2010 (High Court, Kuala Lumpur)

Gopal Sri Ram (Lim Choon Kim, Yau Wai Leong and David Yii with him) (Chan
G *& Assoc) in Appeal No W-02(W)-1230–08 of 2015 for the appellant.*
SK Liow (Barry Goh and Jennifer Lai with him) (Liow & Co) in Appeal No W-02(W)-1231–08 of 2015 for appellants.
SK Liow (Barry Goh and Jennifer Lai with him) (Liow & Co) in Appeal No W-02(W)-1230–08 of 2015 for respondents.
H *Gopal Sri Ram (Lim Choon Kim, Yau Wai Leong and David Yii with him) (Chan & Assoc) in Appeal No W-02(W)-1231–08 of 2015 for the respondent.*

Hamid Sultan JCA (delivering judgment of the court):

I **[1]** The appellant/third defendant appeal (W-02(W)-1230–08 of 2015) is against the decision of the learned trial judge relating to law of assignment, fraud and indefeasibility of title where the respondents/plaintiffs succeeded partly. The respondents/plaintiffs also has filed an appeal (W-02(W)-1231–08 of 2015). The plaintiffs' prayers and the third defendant's prayers in respect of

the claim and counterclaim read as follows: A

(a) the plaintiffs' prayers:

43.1 Satu deklarasi bahawa Perjanjian Jual Beli Lot tersebut bertarikh 4/4/2006 adalah sah, dan Plaintif Pertama ialah pemilik Lot tersebut yang sah; B

43.2 Satu deklarasi bahawa Perjanjian Pembinaan Perumahan tersebut bertarikh 4/4/2006 adalah sah, dan Plaintif Pertama ialah pemilik Rumah tersebut yang sah;

43.3 Satu deklarasi bahawa Perjanjian Jual Beli Lot Kedua tersebut bertarikh 28/7/2009 adalah tidak sah; C

43.4 Satu deklarasi bahawa Plaintif Ketiga adalah berhak untuk didaftarkan sebagai Penerima Gadaian bagi Lot tersebut;

43.5 Satu deklarasi bahawa mana-mana Perjanjian Jual Beli seterusnya untuk Hartanah tersebut (jikalau ada) juga adalah tidak sah; D

43.6 Suatu Memorandum Pindahmilik yang sah dan boleh didaftarkan yang berpihak kepada Plaintif Pertama dan Hakmilik Asal hendaklah dihantarserahkan oleh Defendan Pertama kepada Plaintif Ketiga iaitu Public Bank Berhad untuk disempurnakan dan didaftarkan; E

43.7 Perintah Retifikasi kepada Pejabat Tanah berkenaan berdasarkan Sekyen 417 Kanun Tanah Negara (1965) bahawa nama Defendan Ketiga dalam Hakmilik Individu Lot tersebut dibatalkan dan nama Plaintif Pertama didaftarkan di atas Hakmilik Individu Lot tersebut sebagai pemilik, dan juga gadaian Plaintif Ketiga iaitu Public Bank Berhad didaftarkan ke atas Hakmilik Individu Lot tersebut sebagai penggadai; F

43.8 Penghakiman terhadap jumlah wang sebanvak RM566,370.00 sebagai wang tebusan 'Redemption Sum' kepada Bank Bumiputra Commerce Berhad yang masih dihutangi oleh Defendan Pertama; G

43.9 Faedah pada kadar 5% setahun ke atas RM566,370.00 yang dikira dari 6/9/2006 sehingga penyelesaian penuh terhadap Defendan Pertama dan Defendan Kedua; H

43.10 Penghakiman terhadap jumlah RM261,719.84 terhadap Defendan Pertama dan Defendan Kedua;

43.11 Faedah pada kadar 8% setahun ke atas RM261,719.84 yang dikira dari 23/8/2010 sehingga penyelesaian penuh terhadap Defendan Pertama dan Defendan Kedua; I

43.12 Perintah Restitusi dan ganti rugi daripada Defendan Pertama dan Defendan Kedua untuk sebarang kerugian yang akan

dikenakan atau 'Loss of expected profit' sekiranya Plaintif Pertama gagal menuntut balik Hakmilik Individu Lot tersebut;

43.13 Yuran peguam dan yuran kaunsel bagi guaman ini di bayar kepada Plaintif-plaintif masing-masing oleh Defendan-defendan;

43.14 Kos Mahkamah; dan

43.15 Lain-lain perintah atau relif yang dianggap sesuai dan adil oleh Mahkamah Yang Mulia ini.

(b) the third defendant's prayers:

22. Oleh yang demikian, Defendan Ketiga menuntut daripada Plaintif Pertama:

c. Gantirugi untuk kerugian dan kerosakkan yang dialami akibat daripada kemasukkan kaveat persendirian yang tidak betul dan tidak sah di mana gantirugi tersebut akan ditaksirkan oleh Mahkamah;

d. Faedah pada kadar 8% setahun ke atas gantirugi yang ditaksir oleh Mahkamah dan dikira dari 25.5.2010 sehingga penyelesaian penuh;

e. Kos; dan

f. Relif-relif selaniutnya yang difikir suaimanfaat dan adil oleh Mahkamah yang mulia ini.

[2] The learned trial judge had written a 22 pages judgment in a style of a letter without setting the law or relevant statutory provisions or case laws and not even the facts or evidence to justify a judgment and grounds of a High Court worthy of any form of judicial reference by this court. The judgment repeats: (i) issues set out by the plaintiffs; (ii) issues set out by the first defendant; and (iii) issues set out by the third defendant. The suit was not properly managed by the trial judge as set out in O 34, in particular, matters relating to agreed facts or issues. To compound the problem, the learned trial judge again repeats the issues in the judgment and without any form of judicial appreciation of facts or evidence or law, answers the questions post by the parties in a manner compromising the role of judicial accountability to the parties to the action as well as to the appeal courts. The judgment of the learned trial judge is reported as *Yeo Ping Ting lwn Janavista Sdn Bhd* [2015] MLJU 799.

[3] Learned counsel for the third defendant, Datuk Seri Gopal Sri Ram who was a former Federal Court judge took serious objection to the lack of judicial propriety displayed in the judgment and said that the third defendant's appeal based on established case laws must be allowed as of right.

[4] Learned counsel further, inter alia, asserted as follows:

11. Nowhere in her judgment has the learned judge explained the nature of the fraud on which she was convicting the third defendant and her reasons for doing so. With respect, general words such as 'based on the evidence' and on 'a balance of probabilities' are insufficient to support a finding of fraud because they merely serve to obfuscate and not to elucidate. The judicial mind is not revealed. On this ground alone the appeal should be allowed as it has occasioned a grave miscarriage of justice of which the third defendant is the victim.

(See *Eagil Trust Co Ltd v Pigott-Brown and another* [1985] 3 All ER 119 at p 122; *R v Harrow Crown Court, ex parte Lingard* [1998] Lexis Citation 2547.)

[5] However, learned counsel SK Liow for the plaintiffs says that the judgment which the third defendant sees as anchored on the foundation of lack of judicial propriety is a speaking judgment, save as to issues relating to the plaintiffs cross-appeal. In essence, learned counsel for the plaintiffs having obtained a favourable decision from the High Court is not prepared to concede that the judgment suffers from any form of jurisprudential defects in form or substance to invite us to set aside the order and send it for retrial before another judge.

[6] The brief facts of the case had been summarised before us as follows:

1. P1 was at all material times and currently a director and shareholder of P2.
2. D1 at all material times is the owner and a housing developer of a plot of land known as section 10, Kota Damansara, Daerah Petaling Selangor with a total area of approximately 138,956 square foot (the said property).
3. On 12.12.2005, D2 awarded one project to P2 for the work piling works for the proposed development of 12 units' semi-detached house and 25 units of terrace house on Lot 1539 and 1540 Kampung Kerinchi, Kuala Lumpur (the project).
4. The project was completed on 30.12.2005 and certificate of practical completion was issued. P2 alleged that although the project has long been completed, D2 had failed to pay the amount of debt of RM1,477,972.90 to P2.
5. On 4.4.2006 one settlement agreement was entered between P2 and D2 whereby the settlement agreement would bind the sale and purchase lots and the housing development agreement in which D1 agreed to dispose one unit of bungalow to P2 and/or its nominee a lot known as Lot No 9 Type A2 Polo Vista di bawah HSD 222962 PT No 8656, Pekan Sungai Buloh Daerah Petaling Selangor at No 3, Jalan Kenyalang 11/18A Section 10, Kota Damansara, Pekan Baru, Sg Buloh, Selangor with an area of approximately 6,297.09 square feet amounting to RM879,335.00 where in return D2 agreed to develop a house on the said lot for RM1,008,565.00.

6. P2 had nominated P1 and gave him full authority to enter into the sale and purchase agreement for the said lot and the development agreement for the said property.

7. The plaintiffs averred that D1 was supposed to give vacant possession on/before 4.4.2009 however D1 had failed to do so.

8. P1 and/or P2 had made full payment as stated in a letter dated 24.5.2006 from D1 and D2 to P1.

9. On 3.8.2006, P1 had charged the said property to P3 as P2 needed financial assistance to fund for another project.

10. On 6 September 2006, P3 had issued out loan amounting to RM53,630.00 and RM599,143.50 respectively to D1 and D2. On 7.9.2006, D1 and D2 had issued out the said loan to P2. The plaintiffs averred that the act of D1 and D2 proved that they acknowledged the debts owed to P2.

11. On 3.3.2010, Messrs ED Louis & Associates had served a bundle of court documents to P1 and P1 alleged that he was shocked to see from the court documents that the said property has been sold by D1 to D3 for an amount which was very nominal ie RM314,844.00 without the knowledge and/or the permission of P1 and/or P2 and/or P3. The plaintiffs alleged that at all material times, the defendants knew that P1 was the bona fide purchaser of the said property and on 17.4.2009 and 26.5.2009, P1 had sent letters to D1 to remind D1 about the said property.

12. On 12.10.2009, the individual strata title of the said property was registered in the name of D3.

13. On 25.5.2010, P1 had lodged a private caveat for the said property to protect his interest and to prevent D1 and/or D3 from conducting any transfer over the said property.

14. The plaintiffs claimed that the defendants had committed fraud and/or conspiracy against the plaintiffs without any basis and with mala fide when in actual fact D1 had knowledge that the said property has been sold to P1 on 4.4.2006.

15. The learned High Court Judge had allowed the plaintiffs' claim against D3 save for the plaintiffs are to pay RM314,844.00 to D3. Dissatisfied with the decision, the plaintiffs filed this appeal.

PRELIMINARIES

[7] The first defendant was the developer and the owner of the development land was PKNS. The second defendant was the contractor. The second plaintiff was the subcontractor. The second defendant ('the contractor') owed the second plaintiff ('the subcontractor') monies. The first defendant ('the developer') owed monies to the second defendant ('the contractor'). To

off-set the debts, the first defendant ('the developer') agreed to give a lot in the land to the second plaintiff ('the subcontractor') with a further agreement that the land will be given to the first plaintiff who was a director of the second plaintiff. The first and second defendant also signed an agreement with the first plaintiff to construct a bungalow on the lot upon payment by the first plaintiff.

[8] *All the three agreements were signed in the year 2006 but there was no endorsement of the sale and purchase agreement by PKNS*, to give the plaintiffs a right in rem to impeach the title pursuant to s 340 of the National Land Code ('the NLC'). What the plaintiffs had at the most a *personam* action as PKNS was already holding a separate document of title for the said lot in 2005 itself. The first defendant had not disclosed these facts in the agreements as well as sale and purchase agreement. Subsequently, the first plaintiff had charged the property to Public Bank, based on facilities agreement, deed of assignment, power of attorney, *a transaction which will only be relevant if there is no title issued to the property*. The learned trial judge's failure to deal with the title issue as well as the related sale and purchase agreement and assignment, etc is an omission which compromises the decision making process. This issue which goes to the heart of the plaintiffs' locus standi is a jurisdictional issue related to s 340 of the NLC which ought to have been considered whether or not it was the pleaded case of the parties. (Emphasis added.)

[9] It must also be noted that the first defendant had charged the master title to the CIMB Bank and the said lot was redeemed from the loan provided by the third plaintiff. The first defendant, by a subsequent sale and purchase agreement dated 28 July 2009 had sold the said lot as well as another five lots. The said lot was duly transferred pursuant to the NLC to the third defendant and the third defendant is the registered proprietor of the said lot. In respect of the other lots, we have been told that there were similar suits filed related to different banks. Four of the suits were dismissed by the courts in favour of the appellant. The appellant/third defendant here says that this suit by the plaintiffs also ought to be dismissed.

[10] These appeals also raise an important point of law that is to say, whether an appeal should be allowed as of right when the judgment does not reflect judicial appreciation of facts and law as well incorporation of the same in the judgment. The traditional view has been that if it is not a speaking judgment and relates to finding of facts and demeanour of witness, it has to be set aside as of right and remitted back to the trial court and to be heard by another judge. The saving provision in the Courts of Judicature Act 1964 ('the CJA') to some extent permits the court to rehear the matter based on the appeal record and where necessary to call for further evidence as well as hearing in the Court of Appeal itself. Section 69 of the CJA reads as follows:

69 Hearing of appeals

(1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

[11] The saving provision is rarely exercised if finding of facts and demeanour of witnesses are largely involved. The saving provision will be useful in cases where basic facts and findings are sufficient to determine the appeal. *In the instant case one important fact which is glaring in the eye of this court is the fact that the title relating to the property in issue was already issued as early as 2005 and that too to PKNS.* The agreements which were entered to by the plaintiffs and first and second defendants were in 2006 and the third plaintiff who had given a loan based on the property were dealing with sale and purchase agreement as well as assignment and power of attorney concepts, etc to secure the charge when title has been actually issued. The title issue and the irregular documentation in consequence, in our view as a matter of law will be sufficient to allow the appeal *in limine*. We will deal with these issues later in the judgment. However, for better understanding of our decision, it is important to note that whatever rights the plaintiffs have secured through the first defendant is only a right *in personam* and not a right in rem on the title for s 340 of the NLC to apply. (Emphasis added.)

MERITS

[12] We will now proceed to deal with the appeals on merits. For purpose of allowing the appeal as of right based on the contention of the appellant counsel, the judgment of the High Court must be read together with this judgment to

appreciate the problem in hand in the proper perspective (see *Yeo Ping Ting lwn Janavista Sdn Bhd* [2015] MLJU 799).

[13] We do not think it is proper exercise within our jurisprudence to allow an appeal purely on the grounds that the judgment is not a speaking judgment and one which cannot be classified as grounds of judgments, according to law. The proper thing to do in such cases is to either before hearing the merits of appeal, to set aside the judgment and sent it back to the trial court for rehearing the matter before another judge. Support for the proposition is found in a number of cases. Quite recently, Nallini Pathmanathan JCA in the case of *Kamdar Sdn Bhd v Bipinchandraa a/l Balvantrai & Ors* [2016] MLJU 974 with similar issues in great length, had opined:

> [112] In these circumstances we have no option but to reluctantly remit this case for re-hearing to the High Court. It would not be tenable for this court to undertake the task of making primary findings of fact in respect of the numerous issues that have not been addressed in the current judgment.

[14] If the appeal can be heard without the need for finding on witnesses' credibility as well as demeanour, etc and can be decided based on settled legal principles, then the appeal must proceed by way of rehearing and the appellate court can come to its own decision whether or not to allow or dismiss the appeal. The pleading rules will play less significance when issues of law are patent from the primary facts and/or evidence.

[15] It would have been productive in case of a judgment which will not assist the Appeal Court for the Courts of Judicature Act to have provision for the judgment to be sent back to the trial judge to provide a speaking judgment within a fixed time as the Chief Justice may stipulate. Such a step and amendment will assist the administration of justice and arrest lack of judicial propriety in judgments, the nature of which the third defendant complains off.

MEMORANDUM OF APPEAL

[16] The memorandum of appeal of the appellant reads as follows:

> 1. The Learned Judicial Commissioner erred in law and in fact in allowing the Respondents' claim against the Appellant and dismissing the Appellant's counterclaim.
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> 2. The learned Judicial Commissioner erred in law and fact in failing to give sufficient judicial evaluation or appreciation of the entire evidence and the law and as to truth or otherwise of the contents and/or admissibility of the documents produced by the Respondents and/or had misdirected herself when drawing an inference and came to the wrong conclusion in relation to all the relevant issues to be decided in the case.

3. The learned Judicial Commissioner erred in law and fact in not holding that the First and Second Respondents had no locus standi to commence the suit in view of assignment of the subject Property to the Third Respondent.

4. The learned Judicial Commissioner erred in law and fact in failing to apply or apply correctly the legal principles to the issue concerning fraud under section 340 of the National Land Code, conspiracy and other relevant issues to be decided in the case and the appreciate the standard of proof thus occasion a miscarriage of justice.

5. The learned Judicial Commissioner erred in law and fact in not holding that in the circumstances and on the entirety of the evidence the Respondents had failed to prove the allegation of fraud or conspiracy to default or insufficient or void instrument based on their pleaded case against the Appellant and/or that the title of the Appellant whose name was registered as proprietor of the subject Property was not defeasible.

6. The learned Judicial Commissioner erred in law and fact and had misdirected her mind having insufficient judicial appreciation that the Appellant was not (a party or privy to the allegation of fraud or conspiracy complained of and/or that the alleged fraud or conspiracy complained of had not resulted in the transfer of the subject Property to the Appellant.

7. The learned Judicial Commissioner erred in law and fact in failing to appreciate sufficiently that the present new management of Janavista Sdn Bhd ('Janavista') had no prior knowledge of the alleged contra settlement and alleged sale and purchase agreement involving its old management and the First and Second Respondents and that such evidence is relevant in determining whether the sale of the subject Property to the Appellant in the circumstances of the case was without fraudulent or dishonest intent in law and other relevant legal issues to be decided.

8. The learned Judicial Commissioner erred in law and fact in not holding that the Appellant was not related to Janavista and even if they were related (not admitted), that relationship coupled with the totality of the evidence are insufficient in law to infer any alleged fraud, conspiracy or wrongdoings on the part of the Appellant so as to defeat the Appellant's title, interest or priority over the subject Property.

9. The learned Judicial Commissioner erred in law and fact when in considering the various issues to be decided in the case in attaching too much weight on the evidence of the Respondents without contrasting on the inaction of the Respondents in asserting their alleged title or interests over the subject Property since April 2006 by registering their title or interests and/or that the purchase price was not fully paid or the loan sum not fully disbursed by the Respondents.

10. The learned Judicial Commissioner erred in law and fact in holding that the Appellant had acquired the subject Property at below the alleged market price and in so doing had misdirected her mind in not appreciating that the acquisition costs expended by the appellant to purchase the Property was about RM1,314,844.00 (and not RM314,844.00), in that:

(1) The Appellant had bought 6 pieces of properties (including the subject Property) *en bloc* from Janavista;

(2) These said 6 pieces of properties were in abandoned status and located within a same housing Project;

(3) Apart from the sale and purchase prices, a further sum of RM6 million (RM1 million for each property) had incurred by the Appellant to rectify and complete the properties (including the subject Property);

(4) The Appellant had produced sufficient evidence in establishing that the acquisition price incurred by the Appellant to acquire and complete the subject Property was above RM1,314,844.00 up to the stage of applying and procuring certificate of fitness; and

(5) The alleged valuation of the subject Property by the Respondents was unreliable, and/or unsupported.

11. The learned Judicial Commissioner erred in law and fact and without directing her mind whether the allegation of conspiracy complained of by the Respondents was a conspiracy by lawful or unlawful means and the relevant legal principles governing each of the tortious action.

12. The learned Judicial Commissioner erred in law and fact in failing to hold that the Respondent had failed to establish the alleged conspiracy to defraud based on their pleaded case for lack of particulars, and/or further that insufficient valid evidence was adduced at the trial to prove: (1) the terms or ingredients of the alleged conspiracy involving the Appellant; (2) the existence of any alleged conspiratorial agreement involving the Appellant with other alleged conspirators; and/or (3) the alleged overt acts being carried out by the Appellant in furtherance of the alleged conspiratorial agreement.

13. The learned Judicial Commissioner erred in law and fact in failing to hold that inadequate valid evidence was adduced by the Respondents to prove that the registration of the title in the name of the Appellant as proprietor of the subject Property was obtained by any insufficient or void instrument.

14. The learned Judicial Commissioner erred in law and fact when in deciding the various issues before the Court without sufficient evaluation or appreciation of the evidence that the Appellant had conducted proper investigation prior to the purchase of the subject Property and that adequate acquisition costs were incurred by the Appellant and other relevant consideration.

15. The learned Judicial Commissioner erred in law and fact in holding that the Respondents had priority over the subject Property despite a contrary findings of fact that the Respondents had failed to fully settle the purchase price or the loan sum not fully disbursed, and notwithstanding the undisputed facts that: (1) the Appellant was a party registered first in time on the official registry; and/or (2) the inaction of the Respondents to assert their alleged rights or interests over the subject Property by registering their alleged rights or interests.

16. The learned Judicial Commissioner had erred in law and fact in failing to consider sufficiently and/or to follow the previous decisions of the other Courts which involved similar dispute in the acquisition and completion of the said 5 other properties by the Appellant from Janavista which decisions were decided in favour of the Appellant concerning similar facts and legal issues.

17. The learned Judicial Commissioner erred in law and fact in awarding a grossly inadequate conditional payment of RM314,844.00 to the Appellant without taking into sufficient consideration the costs incurred by the Appellant to complete

A the abandoned subject Property, the prevailing market value of the Property and/or that the Respondents had unjustly enriched themselves by obtaining a fully completed property with certificate of fitness from an abandoned property.

18. The learned Judicial Commissioner erred in law and fact in failing to hold that the First and the Third Respondents:

B

(1) had no caveatable interest in the subject Property in law and accordingly the private caveats lodged by them ought to be removed forthwith and the Appellant's counterclaim be allowed with costs; and/or

(2) were wrong in law to have lodged the private caveat since at the relevant C time of lodgment the Appellant had already being registered as the registered proprietor of the subject Property.

19. The decision of the learned Judicial Commissioner was contrary to and wrong in law and was unreasonable that no reasonable tribunal in similar circumstances would have come to a similar decision.

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[17] What is important to note in this case are as follows:

(a) PKNS was the registered proprietor of the property and the first defendant was not;

E (b) the settlement agreement and the sale and purchase agreement which the first and second plaintiffs and the subsequent charge given to the third plaintiff in 2006 was done so when the individual title to the lot has been issued. From the documents before the court, it is an undisputed fact that the title to the lot has been issued in PKNS name in F 2005 itself;

(c) PKNS who had the title in its name to the property was not a party to the sale and purchase agreement related to the plaintiffs and in consequence, s 340 of the NLC will be of no assistance to the plaintiffs in this suit. Only a registered proprietor can create a beneficial estate out G of his title (see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12); and

(d) the third defendant is the registered proprietor of the land, having obtained good title from PKNS which is indefeasible under s 340 of the H NLC renders the plaintiffs claim unsustainable as per the pleaded case. On this issue, the learned counsel for the appellant/third defendant submits as follows:

LAW

I 18. The root principle of the Torrens system is that the register should be a mirror of title and that a purchaser should not have to search beyond this title: *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, FC. *Khaw Poh Chhuan v Ng Gaik Peng* [1996] 1 MLJ 761, p 778.

19. The basic rule at law, as in equity, is that estates and interests primarily

rank in order of creation. *Qui prio est tempore potior est jure*; he who is earlier in time is stronger in law. Where there is a system of registration of titles to land, like NLC, the one who succeeds in the scramble to get on the register emerges victorious.

20. The law governing indefeasibility of title or interest in a land is principally found in s 340 of the National Land Code 1965 ('NLC') where it provides:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

21. Section 340 of NLC along with the distinction between 'immediate defeasibility' and 'deferred defeasibility' were extensively reviewed and considered by the Federal Court in *Tan Ying Hong v Tan Sian San* [2010] 2 CLJ 269. The relevant passages are found at:

pp 283–4

> [19] Section 340 of the NLC introduced into our land law the concept of indefeasibility of title. This is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was in *PTJV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd* [1980] 1 LNS 55

observed that 'the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it.' Indefeasibility is defined by the Privy Council in *Frazer v Walker* [1967] AC 569 at p 580 to mean:

> The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[20] Indefeasibility can be immediate or deferred.

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis a vis the title or interest.

p 291

[44] We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s 340(1), (2), and (3) of the NLC ...

pp 293–4

[50] As we see it, sub-s (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads: ...

[51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.

[52] Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any

land. Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

BONA FIDE PURCHASER FOR VALUE (DEFERRED INDEFEASIBILITY)

22. In this case, PKNS was the first registered proprietor of the Land since 2005. The Land was sold to the 1st defendant and subsequently to the 3rd defendant.

23. On the evidence, the 3rd defendant is the subsequent purchaser of the Land. It is humbly submitted that s 340(3) of NLC applies. The issue is whether the 3rd defendant is a bona fide purchaser for value of the Land.

Kindly see, inter alia:

– *Tan Ying Hong v Tan Sian San* supra;

– *Tan Ong Ban v Teoh Kim Heng* [2016] 3 CLJ 193, FC, pp 208–209 [52];

– *Yap Ham Seow v Fatimawati bt Ismail* [2014] 1 MLJ 645, CA, p 665 [61], p 666 [64].

24. With the greatest of respect, the learned trial judge has misdirected herself on the facts and the law and this justifies appellate intervention as she had failed to determine first whether the provisions s 340(2) or (3) applies.

25. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd,* [2015] 2 MLJ 441, the Federal Court held at p 464:

[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:

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It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309).

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26. In *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785, the Federal Court held at p 800:

C

[26] Thus, the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial

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appreciation of evidence. (See *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309).

27. In *Dr Shanmuaanathan v Periasamv s/o Sithambaram Pillai* [1997] 3 MLJ 61, the Federal Court held at p 82:

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... having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had

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not taken proper advantage of his having seen and heard witnesses (per Lord Thankerton in *Watt or Thomas v Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

28. The Federal Court in *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 CLJ 1, 18H-I held:

G

It is well established that failure to consider important (material) evidence or important surrounding circumstances would constitute an error of law and it would be open to interfere in second appeal.

H

29. Further, the Federal Court in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 1 CLJ 585 at pp 599d, 599–600 held:

Where the trial Court has so fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

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Where the decision occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of the respective cases and contentions.

[18] What was posed by the parties as complex issues at the trial court framing convoluted questions as issues have been remedied by the learned counsel for the appellant/third defendant in a simple manner for us to deal with the appeal.

[19] The learned counsel for the third defendant's submission, inter alia, reads as follows:

1. The plaintiffs' case is that they obtained a beneficial interest in the subject property that is superior to that of the third defendant's.

2. To address that contention, the starting point is to recognise that PKNS was the registered proprietor of the subject property and had no dealings whatsoever with the plaintiffs.

3. What the plaintiffs assert is an alleged beneficial interest in the subject property that they acquired from the first defendant who was not the registered proprietor. The third defendant says 'alleged' because the precise nature of the interest and the manner in which the first defendant acquired interest from PKNS was not established by the plaintiffs. By contrast, the third defendant went onto the register as proprietor pursuant to a memorandum of transfer executed by PKNS.

4. The third defendant rests its case on the proposition that only a registered proprietor may create a beneficial estate out of his title. In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, the Federal Court expressed the true proposition in the following terms:

   In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when *the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser,* for it is then that the vendor divests himself of his interest in the land.

5. In the present case, it is NOT the plaintiffs' case that PKNS was a bare trustee for them. Their case is that the first defendant was a bare trustee of its beneficial interest. With respect that is not correct. What happened here was an absolute sale of an alleged beneficial interest in the subject property by the first defendant to the first plaintiff (who then subsequently and absolutely assigned this to the third plaintiff). There was no equitable estate left in the hands of the first defendant to constitute it a bare trustee. It is settled law that there can be no trust unless there is property — either legal or equitable upon which a trust may be impressed. A trust cannot exist in vacuo.

6. So, at best what the plaintiffs took was the interest of the first defendant allegedly had in the subject property. As against that, the third defendant has the registered proprietorship. And there is no attack on the title of

PKNS on the ground that it had nothing to transfer. As such the registered title of the third defendant is protected by the indefeasibility provision in s 340(1).

[20] Learned counsel for the plaintiffs was not able to convince us on the title issue and the applicability of s 340 of the NLC which we mentioned earlier.

[21] We have read the appeal record and the able submissions of the parties. After much consideration to the submission of the learned counsel for the plaintiffs, we take the view that the appellant/third defendant's submission stated above has merits and in consequence the third defendant's appeal is allowed with costs of RM25,000 subject to allocatur and the plaintiffs is dismissed with no order as to costs. All the orders of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

Elitprop's appeal allowed, the plaintiffs' appeal dismissed and orders of the High Court set aside.

Reported by Ashok Kumar